

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DONALD RAY LEE,

Petitioner,

vs.

E. K. MCDANIEL, et al.,

Respondents.

Case No. 3:05-CV-00378-ECR-(RAM)

ORDER

Before the Court are the Amended Petition for Writ of Habeas Corpus (#11), Respondents' Answer (#70), and Petitioner's Reply (#73). The Court finds that relief is not warranted and denies the Amended Petition (#11).

This case involves five shootings in Las Vegas and North Las Vegas on the night of August 9-10, 1985. Around 11:00 p.m. on August 9, occupants of a two-tone Toyota opened fire near the intersection of D St. and Jackson Ave. Christopher Shelton, a pedestrian, was shot through the ankle. Darrell Finks, a passenger in a pickup truck, was shot in the buttocks. Around 2:10 a.m. on August 10, occupants of a two-tone Toyota opened fire near H St. and Monroe Ave. Ronnie Johnson, who was leaning against a vehicle and talking with friends, was shot through the abdomen. Around 3:00 a.m., occupants of a two-tone Toyota opened fire in the Doolittle Center public housing complex near H St. and Owens Ave. Miecha Grayson, a passenger on a moped, was shot in the neck. Some time between 3:00 a.m. and 3:38 a.m., John Brown was abducted from an apartment complex near Holly Ave. and Simmons St., where he was preparing newspapers for delivery. He was robbed, and he was beaten and shot to death between some apartments near Holly

1 Ave. and Allen Ln. Around 3:30 a.m., occupants of a two-tone Toyota opened fire on a car
2 occupied by Larry Brown and Michael Clark. Neither Brown nor Clark were shot, but the car was
3 hit. At 3:38 a.m., police officers Brotherson and Montes, having heard reports of shots being fired
4 from a two-tone Toyota, spotted the vehicle on Lake Mead Blvd. at H St. The driver of the Toyota
5 noticed the officers, turned right onto H St. from the middle lane of eastbound Lake Mead Blvd.,
6 and the officers followed with their lights on. After a short chase, the Toyota crashed. Three people
7 fled successfully from the car, and the officers arrested Reginald Hayes at the scene. Meanwhile, a
8 request for homicide detectives to respond to the apartments near Holly Ave. and Allen Ln. came
9 over the radio. The officers asked Hayes if he knew anything about that shooting, and Hayes said
10 that he did. He then guided the officers to where Brown's body lay. Hayes' information led to the
11 arrests of Eddie Ray Hampton, Philip Minor, and Petitioner. Police recovered a .38-caliber revolver
12 and a sawed-off .22-caliber rifle. The victims' wounds were consistent with these weapons.

13 Philip Minor agreed to plead guilty in exchange for a sentence of life imprisonment
14 without the possibility of parole. Petitioner went to trial with Hayes and Hampton. Petitioner was
15 convicted of four counts of attempted murder with the use of a deadly weapon and one count of
16 murder with the use of a deadly weapon. Ex. 3 (#16-2, p. 13).¹ Petitioner appealed, and the Nevada
17 Supreme Court remanded for consideration whether the prosecution's peremptory challenge of the
18 sole black prospective juror violated the constitution. Ex. 4 (#16-2, p. 16). After an evidentiary
19 hearing, the trial court concluded that there was no constitutional violation. Ex. 5 (#16-3, p. 1); Ex.
20 6 (#16-3, p. 12). The Nevada Supreme Court then dismissed the appeal. Ex. 7 (#16-3, p. 16).

21 Petitioner then submitted in state court a petition for post-conviction relief, with a
22 supporting brief. Ex. 11 (#16-4, p. 9); Ex. 12 (#16-5, #16-6). The district court dismissed the
23 petition as untimely, but the Nevada Supreme Court concluded that the dismissal was incorrect. Ex.
24 19 (#16-8, p. 12). The district court then held an evidentiary hearing. Ex. 21 (#16-9 through #16-
25 15). The district court then denied the petition. Ex. 22 (#17-2, p. 1). Petitioner appealed, and the
26 Nevada Supreme Court affirmed. Ex. 23 (#17-2, p. 10).

27
28 ¹Page numbers in parentheses refer to the Court's electronically filed documents.

1 Petitioner then filed his first federal habeas corpus petition, Lee v. McDaniel, Case
2 No. 3:98-CV-00642-DWH-(VPC). The Court concluded that Petitioner had not exhausted his
3 available state-court remedies for all his grounds. Petitioner elected to dismiss the action and return
4 to state court.

5 Petitioner then filed his second state habeas corpus petition. Ex. 25 (#17-1). The
6 district court dismissed the action because it was untimely and successive, pursuant to Nev. Rev.
7 Stat. § 34.726 and § 34.810, respectively. Ex. 29 (#17-9, p. 1). Petitioner appealed, and the Nevada
8 Supreme Court affirmed. Ex. 30 (#17-9, p. 8).

9 Petitioner then filed his second federal habeas corpus petition (#4) in this action. The
10 Court appointed counsel, who filed the Amended Petition (#11). The Court determined that
11 Petitioner had not exhausted his available state-court remedies for Ground 10, and the Court
12 determined that Petitioner had procedurally defaulted Ground 12. Order (#66). Petitioner elected to
13 dismiss Ground 10. Decl. (#68).

14 “A federal court may grant a state habeas petitioner relief for a claim that was
15 adjudicated on the merits in state court only if that adjudication ‘resulted in a decision that was
16 contrary to, or involved an unreasonable application of, clearly established Federal law, as
17 determined by the Supreme Court of the United States,’” Mitchell v. Esparza, 540 U.S. 12, 15
18 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication “resulted in a decision
19 that was based on an unreasonable determination of the facts in light of the evidence presented in
20 the State court proceeding,” 28 U.S.C. § 2254(d)(2).

21 A state court’s decision is “contrary to” our clearly established law if it “applies a
22 rule that contradicts the governing law set forth in our cases” or if it “confronts a set
23 of facts that are materially indistinguishable from a decision of this Court and
24 nevertheless arrives at a result different from our precedent.” A state court’s decision
25 is not “contrary to . . . clearly established Federal law” simply because the court did
not cite our opinions. We have held that a state court need not even be aware of our
precedents, “so long as neither the reasoning nor the result of the state-court decision
contradicts them.”

26 Id. at 15-16. “Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court
27 may not issue the writ simply because that court concludes in its independent judgment that the
28 relevant state-court decision applied clearly established federal law erroneously or incorrectly.

1 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75-76
2 (2003) (internal quotations omitted).

3 [T]he range of reasonable judgment can depend in part on the nature of the relevant
4 rule. If a legal rule is specific, the range may be narrow. Applications of the rule
5 may be plainly correct or incorrect. Other rules are more general, and their meaning
6 must emerge in application over the course of time. Applying a general standard to
7 a specific case can demand a substantial element of judgment. As a result,
8 evaluating whether a rule application was unreasonable requires considering the
9 rule’s specificity. The more general the rule, the more leeway courts have in
10 reaching outcomes in case-by-case determinations.

11 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

12 When it comes to state-court factual findings, [the Antiterrorism and Effective Death
13 Penalty Act] has two separate provisions. First, section 2254(d)(2) authorizes federal
14 courts to grant habeas relief in cases where the state-court decision “was based on an
15 unreasonable determination of the facts in light of the evidence presented in the State
16 court proceeding.” Or, to put it conversely, a federal court may not second-guess a
17 state court’s fact-finding process unless, after review of the state-court record, it
18 determines that the state court was not merely wrong, but actually unreasonable.
19 Second, section 2254(e)(1) provides that “a determination of a factual issue made by
20 a State court shall be presumed to be correct,” and that this presumption of
21 correctness may be rebutted only by “clear and convincing evidence.”

22 We interpret these provisions sensibly, faithful to their text and consistent with the
23 maxim that we must construe statutory language so as to avoid contradiction or
24 redundancy. The first provision—the “unreasonable determination” clause—applies
25 most readily to situations where petitioner challenges the state court’s findings based
26 entirely on the state record. Such a challenge may be based on the claim that the
27 finding is unsupported by sufficient evidence, that the process employed by the state
28 court is defective, or that no finding was made by the state court at all. What the
“unreasonable determination” clause teaches us is that, in conducting this kind of
intrinsic review of a state court’s processes, we must be particularly deferential to our
state-court colleagues. For example, in concluding that a state-court finding is
unsupported by substantial evidence in the state-court record, it is not enough that we
would reverse in similar circumstances if this were an appeal from a district court
decision. Rather, we must be convinced that an appellate panel, applying the normal
standards of appellate review, could not reasonably conclude that the finding is
supported by the record. Similarly, before we can determine that the state-court
factfinding process is defective in some material way, or perhaps non-existent, we
must more than merely doubt whether the process operated properly. Rather, we
must be satisfied that any appellate court to whom the defect is pointed out would be
unreasonable in holding that the state court’s fact-finding process was adequate.

29 Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004).

30 “Rule 7 of the Rules Governing § 2254 cases allows the district court to expand the
31 record without holding an evidentiary hearing.” Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241
32 (9th Cir. 2005). The requirements of § 2254(e)(2) apply to a Rule 7 expansion of the record, even

1 without an evidentiary hearing. Id. “An exception to this general rule exists if a Petitioner
2 exercised diligence in his efforts to develop the factual basis of his claims in state court
3 proceedings.” Id.

4 The petitioner bears the burden of proving by a preponderance of the evidence that he
5 is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004), cert. dismissed,
6 545 U.S. 1165 (2005).

7 Ground 1 is a claim that the prosecution improperly used a peremptory challenge to
8 strike the only black prospective juror, Michael Stevenson. See Batson v. Kentucky, 476 U.S. 79
9 (1986). A trial judge must determine (1) whether a defendant has made a prima facie showing of
10 discrimination against jurors based upon race, (2) whether the prosecution has an adequate race-
11 neutral explanation for the peremptory challenge, and (3) whether the defendant has established
12 purposeful discrimination. 476 U.S. at 96-98. The trial court recognized those elements and
13 applied them. Ex. 5, p. 5 (#16-3, p. 6). Consequently, the state courts’ determination was not
14 contrary to Batson.

15 The trial court noted that the prosecution stated four factors for its desired jurors: (1)
16 women,² (2) a nexus to Clark County, (3) mature and with children generally in the same age
17 brackets as the victims (22, 21, 17, and 12), (4) born and raised in smaller areas that were not
18 permeated with crime, gangs, and narcotics. Ex. 5, p. 2 (#16-3). These were not the only factors.
19 At the Batson hearing, the attorneys testified that they also considered education, experience with
20 the justice system, and being a victim of a crime, among other things. The prosecution had eight
21 peremptory challenges. It used its first challenge to strike Roger Parkman. Prosecutor Michael
22 Villani testified that Parkman had been arrested for driving under the influence and for possession
23 of a controlled substance, and that Parkman knew one of the defense attorneys. Ex. 57, p. 52 (#60-
24 5, p. 4) The prosecution waived its second through fifth peremptory challenges, in large part
25 because the defendants’ challenges were creating the panel that the prosecution wanted. Ex. 57, pp.

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27 ²Discrimination based upon gender is also unallowable. J.E.B. v. Alabama ex rel. T.B., 511
28 U.S. 127 (1994). The parties do not raise this issue, and the Court will not consider it because
Petitioner’s judgment of conviction became final before the J.E.B. decision.

1 40-41 (#60-4, pp. 17-18). The prosecution used its sixth challenge to remove Benjamin Mitchell,
 2 who had just been drawn to replace the defendants' fifth challenge. Ex. 38, pp. 130-33 (#51-13, pp.
 3 7-10). Villani testified that Mitchell was unemployed, his wife was unemployed, and his children
 4 were very young. Ex. 57, p. 54 (#60-5, p. 6). The prosecution then used its seventh challenge to
 5 remove Michael Stevenson. Ex. 38, p. 139 (#51-13, p. 16). Amelia Martin was selected to replace
 6 Stevenson, and she was removed for an undisclosed reason. Id., p. 143 (#51-14, p. 5). Gabriel
 7 Pascarella was selected to replace Martin, and the defense used its seventh peremptory challenge to
 8 remove him. Id., p. 146 (#51-14, p. 8). Frank Eckerson was selected to replace Pascarella. Id. The
 9 prosecution waived its eighth challenge. Id., pp. 150-51 (#51-14, pp. 12-13). The defense exercised
 10 its eighth challenge upon someone else. Id., p. 151 (#15-14, p. 13).

11 Petitioner argues that the choice to strike Stevenson but to keep Eckerson was racial
 12 discrimination. Neither of them fully fit the prosecution's desired profile. Eckerson was a white
 13 man, had lived in Clark County for a couple of years, was mature but with no children, and was
 14 raised in Nyack, New York, a suburb of New York City. Stevenson was a black man, had lived in
 15 Clark County for one and a half years, was young with young children, and was raised in the west
 16 side of Manhattan, in New York City. One of the prosecutors testified that when he heard
 17 Stevenson say where he was raised, he thought that Stevenson might not have thought that gang-
 18 related shootings were not that much of a problem. Ex. 57, p. 12-13 (#60-3, p. 13-14).

19 The trial court concluded that the state had given racially-neutral explanations and
 20 had not violated Batson. The court held:

21 The arguments propounded by the State for the peremptory challenge of Mr.
 22 Stevenson appear to be racially neutral, and satisfy the requirements of Slappy v.
State, supra, cited with approval in Clem v. State, supra, for the following reasons:

23 1. A group bias that those raised in large metropolitan areas may have been "so
 24 exposed to the crime problem in terms of the underlying social factors which cause
 25 crime so as to be jaded in their point of view towards this case." (State's brief, page
 26 8). Mr. Stevenson was raised on the west side of Manhattan. This area would
 27 certainly appear to fit into that classification. Manhattan either contains or is
 28 immediately adjacent to areas that have substantial gang problems, drug problems,
 and crime. The fact that Mr. Eckerson, who came from Nyack, New York, a suburb
 of Manhattan and Mr. Barr, who came from Houston, were not challenged does not
 negate the State's reasoning. The suburbs is [sic] where Manhattanites, of both
 races, who can afford to, live to get away from the very thing the State is concerned
 about. Further, to compare the west side of Manhattan to the city of Houston is

1 simply not appropriate. Houston is generally considered to be a very conservative
2 and relatively low crime area.

3 2. The State convinced this Court that it performed little or perfunctory
4 examination of all jurors, and hence, this Court feels Mr. Stevenson, in this sense
5 was not treated differently from the other jurors.

6 3. This Court found no evidence of the disparate examination of Mr. Stevenson.

7 4. It is clear that since one of the reasons given for the challenge of Mr.
8 Stevenson was that he came from west side Manhattan, an area that the State
9 regarded as having substantial problems with gangs, violence, drugs, and high crime,
10 the reason given, is not "unrelated to the facts of the case. [sic]"

11 5. The assertions of "disparate treatment" given by the defense herein are
12 explainable:

13 A. The fact that the prosecution did not challenge all males, even though
14 it waived five peremptory challenges has already been explained. The State
15 chose to show that it had great confidence in its case and failed to waive [sic]
16 its final peremptory challenge, not because there was one black left in the jury
17 panel, but because one does not know what qualities a juror selected after the
18 final peremptory challenge is exercised might have.

19 B. The fact that the prosecutor did not challenge white veniremen who
20 had lived in the community for the same or less time than Mr. Stevenson is
21 also logically explained by the State. Mr. Barr, although he had lived in
22 Nevada for only 11 months, was from Houston, Texas, had been the victim of
23 a residential burglary, remembered a newsclip concerning the arrest of the
24 defendants and worked as security at the Riviera Hotel part-time. The rest of
25 the people who had lived in Nevada for approximately the same amount or
26 less time than Mr. Stevenson were females who also had positive
27 characteristics from the viewpoint of the State.

28 C. The fact that some of the other jurors had either no children or
children of similar ages as Mr. Stevenson (17 months and 3 months) was also
satisfactorily explained by the State. Mr. Foreman had lived in Clark County
for five years, was in the National Guard and had been born and raised in
Williams, Arizona; Mr. Barr had positive factors already explained; Mr.
Eckerson was one of the last jurors questioned when the State had only one
peremptory challenge left. He had prior jury duty, was a computer specialist,
worked for the Department of Energy, had 16 years of education and lived in
the community for two years; Ms. McGee, among other positive attributes,
although having no children, was a woman; the same can be said of Ms.
Lillis.

D. The prosecutor's explanation that he was concerned about the
discrepancy between Mr. Stevenson's response of the juror questionnaire that
he had lived in Clark County for one year, and on voir dire he indicated that
he had lived here for 18 months was not offset by the other jurors mentioned
in defenses' brief. Ms. Lillis stated on the questionnaire she had lived in Las
Vegas for 23 years and on voir dire, 24 years. This is obviously not
significant when the goal was to get jurors with nexus to Clark County; Ms.
McGee and Ms. Haws, having made precisely the same discrepancy as that of
Mr. Stevenson were women that more properly fit the profile of the State;

1 Ms. Bedunnah had the same 24 year and 23 year discrepancy as Ms. Lillis;
2 and the reason for keeping Mr. Eckerson has already been discussed.

3 E. The distinction between Mr. Eckerson, who came from Nyack, New
4 York, and Mr. Barr, who came from Houston, Texas and Mr. Stevenson has
already been covered.

5 Ex. 5, pp. 7-10 (#16-3, pp. 8-11) (emphasis in original). The Nevada Supreme Court affirmed this
6 decision. Ex. 7, pp. 2-3 (#16-3, pp. 18-19). The trial court recognized the rule in Batson and
7 analyzed all of the arguments put forth by the prosecution. Its determination that there was no
8 purposeful discrimination is not objectively unreasonable. 28 U.S.C. § 2254(d)(1).

9 Petitioner's Batson argument before this Court is considerably narrower than what he
10 presented to the state court; this Court quoted the full holding of the State court to show how
11 thorough it was. Petitioner's argument here is:

12 The district attorney stated it wanted a certain type of juror that Mr. Stevenson did
13 not resemble, but it chose a white juror with strikingly similar qualities to him,
14 except for skin color. Mr. Stevenson should have been a more desirable juror than
15 Mr. Eckerson. He had children and could relate to the loss of Mr. Brown, and had
been in the military. The discrimination against a potential juror based on race
undermines a defendant's right to a fair trial guaranteed by the Sixth Amendment. A
new trial should have been granted on that basis.

16 Amended Petition, p. 12 (#11). The prosecution never had the option to choose between Stevenson
17 and Eckerson. The prosecution peremptorily challenged Stevenson and Eckerson was seated, after a
18 couple of other replacements were excused. Even if, as Petitioner argues, Stevenson should have
19 been more desirable than Eckerson, the choice then facing the prosecution was whether to excuse
20 Eckerson and take a chance with someone whom the prosecution could not remove. Stevenson was
21 no longer part of the calculation.

22 The Court will turn to Ground 5 because its disposition will affect other grounds.
23 Petitioner gave a statement to the police. He claims that he was not given the warnings required by
24 Miranda v. Arizona, 384 U.S. 46 (1966). The trial court conducted a hearing on this issue.
25 Detective Leavitt testified that he presented a Miranda waiver card and obtained a waiver from
26 Petitioner before taking Petitioner's statement. Petitioner testified that he was informed of his rights
27 and presented with the waiver card after giving his statement. Petitioner also testified that he did
28 not understand those rights. The trial court determined that Petitioner's statement was voluntary,

1 and that he was advised of his Miranda rights before giving a statement. Ex. 44, pp. 1259-61
2 (#56-3, pp. 6-8). It was up to the judge to determine the facts, and, based upon the evidence
3 presented, the Court cannot conclude that the factual determination was unreasonable. 28 U.S.C.
4 § 2254(d)(2). Nor was the trial court's ruling contrary to, or an unreasonable application of,
5 Miranda. 28 U.S.C. § 2254(d)(1).

6 Ground 2 is a claim that trial counsel provided ineffective assistance. Respondents
7 have broken Ground 2 into nine parts, and they argue that Petitioner has not exhausted his available
8 state-court remedies for four of those parts. Respondents also argue that the Court should just deny
9 those unexhausted parts on their merits, pursuant to 28 U.S.C. § 2254(b)(2). Answer, pp. 18-19
10 (#70). That was all they wrote. If they ask the Court to deny parts of a ground on their merits, then
11 they need to argue why the parts of that ground lack merit. Section 2254(b)(2) does not exist as a
12 different label for the Court to discard unexhausted grounds. It exists for the Court to decide the
13 entire petition on the merits without requiring the parties to return to state court to litigate meritless
14 grounds. The Court does conclude that the unexhausted parts of Ground 2 are without merit.

15 “[T]he right to counsel is the right to the effective assistance of counsel.” McMann
16 v. Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of
17 counsel must demonstrate (1) that the defense attorney's representation “fell below an objective
18 standard of reasonableness,” Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the
19 attorney's deficient performance prejudiced the defendant such that “there is a reasonable
20 probability that, but for counsel's unprofessional errors, the result of the proceeding would have
21 been different,” id. at 694. “[T]here is no reason for a court deciding an ineffective assistance claim
22 to approach the inquiry in the same order or even to address both components of the inquiry if the
23 defendant makes an insufficient showing on one.” Id. at 697.

24 Strickland expressly declines to articulate specific guidelines for attorney
25 performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of
26 interest, the duty to advocate the defendant's cause, and the duty to communicate with the client
27 over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's
28 duties so exhaustively as to give rise to a “checklist for judicial evaluation of attorney

1 performance. . . . Any such set of rules would interfere with the constitutionally protected
2 independence of counsel and restrict the wide latitude counsel must have in making tactical
3 decisions.” Id. at 688-89.

4 Review of an attorney’s performance must be “highly deferential,” and must adopt
5 counsel’s perspective at the time of the challenged conduct to avoid the “distorting effects of
6 hindsight.” Strickland, 466 U.S. at 689. A reviewing court must “indulge a strong presumption that
7 counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the
8 defendant must overcome the presumption that, under the circumstances, the challenged action
9 ‘might be considered sound trial strategy.’” Id. (citation omitted).

10 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
11 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.
12 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
13 below an objective standard of reasonableness alone is insufficient to warrant a finding of
14 ineffective assistance. The petitioner must also show that the attorney’s sub-par performance
15 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,
16 but for the attorney’s challenged conduct, the result of the proceeding in question would have been
17 different. Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence
18 in the outcome.” Id.

19 If a state court applies the principles of Strickland to a claim of ineffective assistance
20 of counsel in a proceeding before that court, the petitioner must show that the state court applied
21 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.
22 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

23 The issues that Petitioner presented to the state court concern counsel’s pre-trial
24 activities. Petitioner claimed that counsel did not investigate, interview witnesses, and meet
25 reasonably with Petitioner. A claim that Petitioner now presents is that counsel failed to formulate a
26 defense on behalf of Petitioner, but that is largely a re-phrasing of the claims that Petitioner
27 presented to the state court. On these issues, the Nevada Supreme Court held:
28

1 Second, Lee contends that he was deprived of effective assistance of counsel because
 2 Phillips [one of Lee's attorneys] failed to communicate adequately with him and his
 3 family and, therefore, Lee contends, failed to learn of a crucial alibi witness, Lee's
 4 brother. Phillips stated that he personally investigated a number of alibi witnesses,
 5 but that an alibi defense did not fit with what Lee had said and with what was in the
 6 police reports. We conclude that, in light of the ample evidence tying Lee to the
 crimes—including finger prints, the testimony of his co-conspirators, and his own
 statements to the police—there is not a reasonable probability that the result of the
 trial would have been different, even if Phillips had presented the alibi testimony
 now suggested by Lee. Accordingly, we conclude that this contention is without
 merit.

7 Third, Lee contends that he was deprived of effective assistance of counsel because
 8 Phillips failed to conduct an adequate pre-trial investigation. This contention is
 9 essentially the same as the alibi argument above. We conclude that, although
 Phillips' investigation may have been deficient in some respects, Lee has not
 demonstrated that he has been prejudiced thereby.

10 Ex. 23, pp. 3-4 (#17-2, pp. 13-14). Petitioner had given the police a statement. Detective Leavitt
 11 told Petitioner that John Henry Brown was killed in the early morning of August 10, 1985, at or
 12 around 1908 Allen Lane. Petitioner admitted that he drove a brown and light brown car the night of
 13 August 9 and the morning of August 10. Petitioner denied knowing that the car was stolen.
 14 Petitioner said that he obtained the car from a "Kenny Daniels," and that the keys were in the car.
 15 Petitioner went to an apartment complex known as the Brownies, for a party, to find that the party
 16 was over when he arrived. Petitioner saw a white person walking, delivering newspaper. That
 17 person was shot with a .22-caliber sawed-off rifle. Petitioner also noted that police chased the car,
 18 which crashed, and that he then jumped out of the car and ran. Petitioner said that the white man
 19 was hit one time before being shot. Ex. 44, p. 1264-69 (#56-3, pp. 11-16). Petitioner's statement,
 20 by itself, removed any possibility of an alibi defense. The testimony of Michael Jones, described
 21 below, showed that Petitioner could have no alibi for earlier in the evening. The testimony of the
 22 co-defendants showed that Petitioner could have no alibi for later in the evening. Part of
 23 Petitioner's palm print was found on the car of the murder victim. Petitioner's shoe print was found
 24 on the face of the murder victim. Even if counsel did all that Petitioner argues that counsel should
 25 have done, counsel still would not have been able to develop a credible alibi defense. The Nevada
 26 Supreme Court reasonably applied Strickland. 28 U.S.C. § 2254(d)(1).

27 Next, Petitioner claims that counsel failed to move timely to sever his trial from that
 28 of his co-defendants. Ground 3 is the underlying claim that the trial court abused its discretion in

1 denying the motions for severance from Petitioner and his co-defendants. The Court considers the
2 two claims together. On the ineffective-assistance claim, the Nevada Supreme Court held:

3 NRS 173.135 specifically allows for defendants to be tried together where, as in this
4 case, each is alleged to have participated in the same series of criminal acts. Having
5 reviewed the record in this case, and noting that the several motions for severance
6 presented by Lee's co-defendants were denied by the district court, we conclude that
Lee has not shown a reasonable probability that, but for his counsel's failure to file a
motion to sever, the result of his trial would have been different. Accordingly, we
conclude that this contention is without merit.

7 Ex. 23, pp. 2-3 (#17-2, pp. 12-13) (emphasis added). The emphasized portion of the decision is
8 misleading. In his direct appeal, Petitioner and co-defendant Hayes argued that the district court
9 should have severed the trial. The Nevada Supreme Court noted that the motions for severance
10 were denied because they were untimely, and the Nevada Supreme Court upheld that exercise of the
11 trial court's discretion. Ex. 7, pp. 8-9 (#16-3, pp. 24-25). In the habeas corpus appeal, the Nevada
12 Supreme Court effectively held that Petitioner suffered no prejudice from an untimely motion for
13 severance because a co-defendant also filed an untimely motion for severance.

14 Petitioner's co-defendants, Hayes and Hampton, gave statements to the police that
15 implicated Petitioner in the crimes. However, Hayes and Hampton also testified at trial, and
16 Petitioner's counsel cross-examined them. Because of the availability for cross-examination,
17 Petitioner correctly notes that the joint trial did not violate Petitioner's right to confront the
18 witnesses against him. See Bruton v. United States, 391 U.S. 123 (1968); Santoro v. United States,
19 402 F.2d 920, 922-23 (9th Cir. 1968).

20 Petitioner cites to inapplicable authority in support of his argument that the trial
21 should have been severed. Zafiro v. United States, 506 U.S. 534 (1993), and United States v.
22 Throckmorton, 87 F.3d 1069 (9th Cir. 1996), apply Rules 8 and 14 of the Federal Rules of Criminal
23 Procedure, not the Constitution. Furthermore, Throckmorton is not a holding of the Supreme Court
24 of the United States and is inapplicable pursuant to 28 U.S.C. § 2254(d)(1), too. On the
25 constitutional issue, the Supreme Court of the United States has stated:

26 Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder
27 would rise to the level of a constitutional violation only if it results in prejudice so
28 great as to deny a defendant his Fifth Amendment right to a fair trial.

1 United States v. Lane, 474 U.S. 438, 446 n.8 (1984). However, just as in Zafiro and Throckmorton,
2 the joinder issue in Lane concerned the Federal Rules of Criminal Procedure, not the Constitution.
3 Footnote 8 is a dictum, and the Supreme Court has never actually applied the principle in footnote 8
4 to a constitutional claim that a trial should have been severed. Therefore, the Nevada Supreme
5 Court's decision on severance could not have been contrary to, or an unreasonable application of,
6 clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C.
7 § 2254(d)(1).

8 Furthermore, the ineffective-assistance claim in Ground Two is without merit.
9 Petitioner argues that the joint trial violated his rights because, even with cross-examination, Hayes
10 and Hampton blamed Petitioner for kidnaping Brown and for actually killing Brown. Amended
11 Petition, pp. 24-26 (#11). Testimony from others at the trial showed that Brown was taken from his
12 car at one apartment complex, where he was preparing newspapers for delivery, that Brown was
13 killed at another apartment complex some distance away, that Petitioner's palm print was found on
14 Brown's car, and that Petitioner's shoe print was found on Brown's face. Petitioner's own
15 statement to the police showed that he was involved with the kidnaping and death of Brown. The
16 jury was instructed that killing Brown in the course of kidnaping is first degree murder for all
17 defendants, regardless of who actually killed Brown, and regardless of others forbidding the actual
18 killer to use deadly force. Ex. 37, Instruction 8 (#51-4, p. 12). It did not matter who killed Brown,
19 because all were guilty of first degree murder, and the testimony by Hayes and Hampton that
20 Petitioner was the killer caused Petitioner no prejudice.³ This portion of Ground 2 is without merit.

21 Petitioner argues that trial counsel was ineffective for failing to object to the
22 introduction of evidence of prior bad acts. Petitioner did raise the issue on direct appeal. The
23 Nevada Supreme Court ruled:

24 Appellants Hampton and Lee contend that the district court erred in admitting certain
25 evidence of uncharged crimes, i.e., the testimony of certain witnesses which linked
26 appellants to other shootings on the same night and testimony by the owner of the

27 ³Indeed, blaming Petitioner did them no good, because all three defendants were found guilty
28 of first degree murder with the use of a deadly weapon, and all were sentenced to life imprisonment
without the possibility of parole. See Ex. 7, p. 1 (#16-3, p. 17).

1 stolen car appellants used to commit the crimes. . . . The district court properly
2 admitted this evidence so that the prosecutor could present a full and accurate
3 account of the circumstances surrounding the crimes. . . . The evidence was not
unduly prejudicial, and the district court did not abuse its discretion in admitting it.

4 Ex. 7, p. 7 (#16-3, p. 23) (citations omitted). Even though trial counsel did not object to this
5 evidence, Petitioner was able to litigate the matter on appeal. Therefore, Petitioner suffered no
6 prejudice from the lack of objection at trial. This portion of Ground 2 is without merit.

7 Petitioner claims that trial counsel failed to object to Petitioner's sentence of life
8 imprisonment without the possibility of parole, on the basis of a statute governing the maximum
9 sentence for juvenile offenders. At the time, Nev. Rev. Stat. § 176.025 stated:

10 A death sentence shall not be imposed or inflicted upon any person convicted of a
11 crime now punishable by death who at the time of the commission of such crime was
12 under the age of 16 years. As to such person, the maximum punishment that may be
imposed shall be life imprisonment.

13 The crimes occurred a few days before Petitioner's 16th birthday. Petitioner argues that because the
14 statute did not specify whether the life sentence would contain the possibility of parole, it should be
15 construed strictly in his favor and he should have been sentenced to life imprisonment with the
16 possibility of parole. In 2005, § 176.025 was amended to state:

17 A sentence of death must not be imposed or inflicted upon any person convicted of a
18 crime now punishable by death who at the time of the commission of the crime was
19 under the age of 18 years. As to such person, the maximum punishment that may be
imposed is life imprisonment.

20 The amendment probably was in response to Roper v. Simmons, 543 U.S. 551 (2005). The
21 amendment, as codified, does not affect Petitioner's sentence. However, an portion of the statute
22 that was not codified states:

23 2. A sentence of death to which this act applies retroactively shall be deemed to
24 be commuted to a sentence of life without the possibility of parole on the effective
25 date of this act. The Director of the Department of Corrections shall take all actions
necessary to carry out the provisions of this section.

26 2005 Nev. Stat., c. 33, § 2 (emphasis added). That provision resolves the issue. A sentence of life
27 imprisonment without the possibility of parole is within the scope of § 176.025. Petitioner did not
28 suffer any prejudice from appellate counsel not raising the issue.

1 Petitioner's last issue of ineffective assistance of counsel is that counsel did not
2 object to the guilty verdict for the attempted murder with the use of a deadly weapon of Christopher
3 Shelton, after the prosecution conceded at the closing argument that they had proven battery but not
4 attempted murder. Ground 11 is the underlying claim that the jury improperly returned a guilty
5 verdict for attempted murder. The Court considers both claims at the same time.

6 In considering this claim along with other claims that insufficient evidence was
7 presented to support the verdicts, the Nevada Supreme Court held, "Specifically, several witnesses
8 saw the car from which people were shot at different locations and each identified one or more of
9 the appellants as occupants of that car." Ex. 7, p. 6 (#16-3, p. 22). Shelton testified that he was a
10 pedestrian at or near the intersection of D St. and Jackson Ave. when a two-tone Toyota approached.
11 Shelton saw someone pointing a gun out of the Toyota, shooting at him or in his direction. Ex. 39,
12 p. 252 (#52-5, p. 8). He was hit in the lower left ankle, and the bullet went all the way through. *Id.*,
13 pp. 254-55 (#52-5, pp. 10-11). Darrell Finks testified that at the same time he was a passenger in a
14 pickup truck at or near the intersection of D St. and Jackson Ave., when a two-tone Toyota
15 approached from the opposite direction, and the occupants shot at the truck. Ex. 39, p. 207 (#52-3,
16 p. 3). He was hit in the buttocks. *Id.*, pp. 210-11 (#52-3, pp. 6-7). Michael Jones, who was one of
17 Hayes' witnesses, testified that he was in the two-tone Toyota with Petitioner at the intersection of
18 D St. and Jackson Ave. at the same time, when they approached a pickup truck from the opposite
19 direction and fired their weapons. Earlier, the people in the truck might have acted in some way that
20 Petitioner felt was inappropriate; Jones appeared to be at odds with his own police statement on that
21 matter. Ex. 46, pp. 1607-31 (#57-10, p. 14, through #57-11, p. 14).⁴ Petitioner points out some
22 discrepancies in Shelton's identifications, but all of this evidence combined was more than enough
23 to justify a verdict of guilty for the attempted murder of Shelton.

24
25
26 ⁴Jones testified that he was carrying a sawed-off, .22-caliber rifle during the shooting at D St.
27 and Jackson Ave. Later, Jones and Petitioner went to a party, where Jones was shot. Jones fled, and
28 he dropped the sawed-off rifle. Ex. 46, pp. 1624-38 (#57-11, pp. 6-20). That sawed-off rifle was
used to kill Brown.

1 The Batson hearing brought out the explanation why the prosecutor Michael Villani
2 stated that they did not prove the attempted murder of Shelton. Prosecutor Melvyn Harmon noted
3 that when Villani made that statement, they did not have the transcript, and that they did not
4 remember what the witnesses had said. After reviewing the record, they noted that Shelton had
5 testified that he saw a gun pointed at him from a window of the Toyota. Ex. 57, pp. 47-48 (#60-4,
6 pp. 24-25). Villani's statement was not evidence and, based upon the evidence outlined above, the
7 jury did not agree with him. Ground 11 is without merit, as is the part of Ground 2 concerning
8 counsel's lack of objection to the verdict.

9 Ground 4 is a claim that the district court erred in admitting evidence of Petitioner's
10 prior uncharged crimes. This is a matter of state evidentiary law, which does not implicate any
11 constitutional right unless it renders the trial fundamentally unfair. Estelle v. McGuire, 502 U.S. 62,
12 67-68, 75 (1991). As noted above, Petitioner raised this issue on direct appeal, and the Nevada
13 Supreme Court held:

14 Appellants Hampton and Lee contend that the district court erred in admitting certain
15 evidence of uncharged crimes, i.e., the testimony of certain witnesses which linked
16 appellants to other shootings on the same night and testimony by the owner of the
17 stolen car appellants used to commit the crimes. . . . The district court properly
 admitted this evidence so that the prosecutor could present a full and accurate
 account of the circumstances surrounding the crimes. . . . The evidence was not
 unduly prejudicial, and the district court did not abuse its discretion in admitting it.
18 Ex. 7, p. 7 (#16-3, p. 23). After the short chase, Police found that a butter knife had been used to
19 operate the Toyota's ignition switch. That testimony was unobjectionable, and the jury could infer
20 easily that the car was stolen. Testimony from the Toyota's owner that the car had been stolen did
21 not make the trial unfair. The Nevada Supreme Court reasonably applied McGuire. 28 U.S.C.
22 § 2254(d)(1).

23 Petitioner argues that Michael Jones' testimony introduced evidence of an uncharged
24 shooting that occurred on the same night. Amended Petition, pp. 29-31 (#11). The argument is
25 inaccurate. As shown above, Jones described the shooting at D. St. and Jackson Ave. that led to the
26 wounding of Shelton and Finks, and Petitioner was charged with those crimes. That part of Ground
27 4 is without merit.

1 In Ground 6, Petitioner argues that the prosecution failed to prove that Brown died as
 2 a result of a homicide, because the medical examiner could not rule out accident as a cause of the
 3 death. The Nevada Supreme Court held:

4 Appellant Lee contends that the state has not adequately established the corpus
 5 delicti of the crime, i.e., that a murder had been committed, because the Clark
 6 County medical examiner could not rule out an accident as the cause of death of the
 7 victim, John Brown. The medical examiner testified at trial, however, that he was
 8 certain a homicide was the cause of death. The physical evidence in this case, taken
 9 as a whole, supports the conclusion that John Brown was murdered. Specifically,
 Brown died from a gunshot wound to the head that was not self-inflicted, recovered
 bullet fragments were consistent with the type of gun used by appellants, and a
 herringbone pattern imprinted upon Brown's face was consistent with the tread of
 Lee's shoes. Consequently, this contention lacks merit.

10 Ex. 7, pp. 6-7 (#16-3, pp. 22-23). "The Constitution prohibits the criminal conviction of any person
 11 except upon proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 309
 12 (1979) (citing In re Winship, 397 U.S. 358 (1970)). On federal habeas corpus review of a judgment
 13 of conviction pursuant to 28 U.S.C. § 2254, the petitioner "is entitled to habeas corpus relief if it is
 14 found that upon the record evidence adduced at the trial no rational trier of fact could have found
 15 proof of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. "[T]he standard must be
 16 applied with explicit reference to the substantive elements of the criminal offense as defined by state
 17 law." Id. at 324 n.16. The Nevada Supreme Court reasonably applied Jackson. 28 U.S.C.
 18 § 2254(d)(1).

19 Furthermore, the ground lacks merit. A killing that occurs during the course of
 20 kidnaping or robbery is first-degree murder, regardless of whether the killing was intentional,
 21 unintentional, or accidental. Ex. 37, Instruction 7 (#51-4, p. 7). Even if Brown was killed
 22 accidentally, Petitioner is guilty of first-degree murder.

23 In Ground 7, Petitioner claims that his right to a presumption of innocence was
 24 violated because five jurors saw him shackled on the second day of the trial, November 19, 1985.
 25 Petitioner raised this claim on direct appeal, and the Nevada Supreme Court held:

26 Appellants Hayes and Lee contend that the district court violated their constitutional
 27 rights to a presumption of innocence by denying their motions for a mistrial after
 28 some of the jurors inadvertently saw them in handcuffs, shackles and waist chains.
 This district court instructed the jurors to disregard this incident. Further, the district
 court polled the jurors and determined that Hayes and Lee were not prejudiced by

1 this incident. Therefore, the district court properly denied the motion for a mistrial.
2 See Grooms v. State, 96 Nev. 142, 605 P.2d 1145 (1980).

3 Ex. 7, p. 9 (#16-3, p. 25). “[T]he Fifth and Fourteenth Amendments prohibit the use of physical
4 restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that
5 they are justified by a state interest specific to a particular trial. Deck v. Missouri, 544 U.S. 622,
6 629 (2005). That is the current state of the law. The state of the law in 1985-90 was much less
7 settled. “The Supreme Court has not been presented with the question whether a brief and
8 inadvertent observation by jurors of a defendant in handcuffs outside the courtroom compels an
9 automatic reversal.” U.S. v. Halliburton, 870 F.2d 557, 569 (9th Cir. 1989). It matters not whether
10 that is still the situation today. It was the when the trial occurred in 1985 and when the Nevada
11 Supreme Court dismissed the direct appeal in 1990. Therefore, the Nevada Supreme Court’s
12 decision could not have been contrary to, or an unreasonable application of, clearly-established
13 federal law as determined by the Supreme Court of the United States. Ground 7 is without merit.
14 See 28 U.S.C. § 2254(d)(1).

15 Apart from the operation of § 2254(d)(1), the viewing of Petitioner in shackles by
16 five juror was harmless error. Petitioner’s theory of defense was “that there [was] a conscious effort
17 on the part of the police department, meaning Officer Brotherson and Officers Leavitt and Hatch to
18 convict Donald Ray Lee, evidence that may have been fabricated.” Ex. 49, p. 2048 (#59-4, p. 2).
19 To that end, Petitioner called as a witness Patricia Schmitt, who worked in the Metro Detention
20 Center records section. She testified that Petitioner was booked into custody on August 10, 1985,
21 and that on November 18, 1985, clothing was exchanged for Petitioner’s court appearances. Ex. 49,
22 pp. 2049-51 (#59-4, pp. 3-5). The trial started on that date. See Ex. 38 (#51-6 et seq.). In other
23 words, Petitioner himself introduced evidence that he was in jail. The viewing by five jurors of
24 Petitioner in shackles could not have had a substantial and injurious effect or influence in
25 determining the jury’s verdict, because by the end of the trial Petitioner himself told the entire jury
26 that he was in custody. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

27 In Ground 8, Petitioner claims that the prosecution committed misconduct in the
28 closing argument. On direct appeal, the Nevada Supreme Court held:

1 Appellants Hayes and Lee contend that the prosecutor at their trial committed
2 misconduct requiring reversal of their convictions by injecting his opinion of their
3 guilt, by commenting on the possibility that appellants would kill again and by
4 making arguments concerning community standards. . . . While some of the
prosecutor's remarks were perhaps ill-advised, they were not so egregious as the
prosecutor's conduct in Collier.

5 Ex. 7, p. 9 (#16-3, p. 25) (citing Collier v. State, 705 P.2d 1126 (1985)). "The relevant question is
6 whether the prosecutors' comments so infected the trial with unfairness as to make the resulting
7 conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal
8 quotation omitted). See also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Petitioner takes
9 issue with the Nevada Supreme Court's holding that the prosecutor's comments in this case were
10 not as bad as the prosecutor's comments in Collier, which, among other reasons, resulted in a
11 remand for a new death penalty hearing. However, in Collier the Nevada Supreme Court analyzed
12 whether the prosecutor's comments made the penalty hearing unfair. Although the court did not cite
13 to Darden or other opinions by the Supreme Court of the United States, it used the correct principle.
14 There is nothing unreasonable about the Nevada Supreme Court then using the comments Collier as
15 a basis of comparison for subsequent cases, such as Petitioner's. 28 U.S.C. § 2254(d)(1).

16 In Ground 9, Petitioner argues that the instruction defining reasonable doubt violates
17 the Due Process Clause. See Ex. 37, Instruction 40 (#51-5, p. 12). Despite Petitioner's arguments
18 to the contrary, this instruction is exactly the same as the instruction that the Court of Appeals for
19 the Ninth Circuit determined was constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211-15 (9th
20 Cir. 1998). That court has also held that the issue is not worthy of a certificate of appealability.
21 Nevius v. McDaniel, 218 F.3d 940, 944-45 (9th Cir. 2000). Ground 9 is without merit.

22 As noted above, Grounds 10 and 12 have been dismissed.

23 IT IS THEREFORE ORDERED that the Amended Petition for Writ of Habeas
24 Corpus (#11) is **DENIED**.

25 The Clerk shall enter judgment accordingly.

26 Dated this 9th day of March, 2009.

27 
28 EDWARD C. REED
United States District Judge